

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 11, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

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No. 94-2513-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEPHEN R. HART,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Stephen R. Hart appeals from a judgment convicting him of one count of first-degree sexual assault of a child, contrary to § 948.02(1), STATS., and from an order denying his postconviction motion. Hart raises four issues on appeal: (1) a new trial should be ordered based upon either ineffective assistance of trial counsel, failure to grant a mistrial, or in the interest of justice because a witness commented on the credibility of the victim's claims; (2) the trial court improperly excluded expert testimony that Hart

suffered from sleep apnea thereby preventing him from presenting a defense; (3) records of the victim's counselor contain evidence relevant to his defense; and (4) his counsel was ineffective by waiving his right to individually poll the jury. We conclude that: (1) Hart is not entitled to a new trial based upon ineffective assistance of counsel, failure to grant a mistrial, or in the interest of justice; (2) the sleep apnea evidence was properly excluded; (3) the records contain no relevant evidence; and (4) counsel's performance was not deficient. We affirm.

BACKGROUND

In September 1992, Stephen R. Hart had been living with his girlfriend, Sheri, and her three children, including the victim, W., aged four, for about three years. Hart and Sheri were engaged to be married the following month.

On September 19, Hart had been drinking with Sheri in the late afternoon and into the evening. Hart and Sheri returned home at about 8:30. When they got home, Hart vomited outside of their back door. Hart then went into the bedroom and went to bed.

Sheri went into another room and talked with the baby-sitter. Sheri put W. in bed with Hart and drove the baby-sitter home. Hart was awake when Sheri put W. in bed with him. Sheri was out of the home for about five to ten minutes. When Sheri returned, she sat in the kitchen making wedding invitations. W. came into the kitchen and asked Sheri for a drink and then told Sheri that Hart had "lick[ed] her dooper." Sheri understood this word as a reference to W.'s vaginal area.

Sheri became angry and went into the bedroom and ordered Hart to leave the home. Hart immediately woke up. Hart, angry, fought with Sheri and started destroying property. Sheri grabbed W. and her two other children and ran to her parent's home about one hundred yards away. Once there, the police were called.

Hart was charged with one count of first-degree sexual assault of a child. After a two-day jury trial, Hart was convicted of that charge and sentenced to a ten-year prison term. The trial court also denied Hart's postconviction motion for relief in which it found that trial counsel's performance was deficient but not prejudicial. Hart appeals. Additional facts will be set forth as needed.

IMPROPER WITNESS TESTIMONY

Hart argues that a new trial is warranted because a witness improperly commented on W.'s credibility. According to Hart, he was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution because trial counsel elicited this improper testimony. Hart also argues that the trial court should have granted his request for a mistrial and that we should exercise our discretionary power under § 752.35, STATS., and order a new trial because the real controversy was not fully tried.

The trial turned on the issue of credibility; the jury either believed W. or Hart. After W. testified that she rubbed Hart's back and then Hart "licked her dooper," Wood County Sheriff's Department Investigator Thomas Reichert, who interviewed W. on the night of the assault, stated during cross-examination that W.'s statement was "extremely credible." Instead of asking the court to strike the nonresponsive answer, defense counsel pursued the issue and asked Reichert what he meant by extremely credible. In response, Reichert explained that W. had maintained an extremely consistent story and that her testimony was "the strength of this case."¹

¹ The trial transcript reads as follows:

Q.Okay. In this kind of sexual assaults there isn't any kind of physical evidence. Is that what you're telling the jury?

A.I'm telling the jury that there's an extremely credible statement by a victim.

Q.Why is that?

After Reichert testified, the jury was excused for the day. The trial court then asked defense counsel if he had a tactical reason for eliciting testimony from Reichert as to W.'s credibility. Counsel stated that he did not and requested a mistrial. The court denied the request and counsel asked for a curative instruction. The court indicated that it might give the instruction, but the following morning, when presented with counsel's proffered instruction directing the jury to disregard that part of Reichert's testimony discussing W.'s credibility, the court determined that it would be more appropriate to give an instruction at the end of the trial, before jury deliberations.

Later that same day, defense counsel, during cross-examination, asked another witness, a social worker who had interviewed W., if she had "ma[d]e any judgment at the time as to the plausibility of what you were being told" The trial court immediately interrupted counsel and instructed the jury that it was the sole judge of the credibility of the witnesses and that it should disregard *any* testimony of *any* witness insofar as the witness purported to judge the credibility of another witness. The court stated that witnesses were not permitted to testify as to another witness's credibility because that was left for the jury's determination. Additionally, at the end of the trial, before jury deliberations, the court again instructed the jury that it was not to consider any testimony by any witness passing on the credibility of another witness and that the jury should assess witness credibility. In either case, the court did not specifically refer to the testimony of any particular witness.

(..continued)

A. Due to the—

Q. Why extremely credible? Why do you say that?

A. The victim in this case, four-year-old child, has maintained an extremely consistent story from the time that this originally happened last September until today, November 4th. I personally thinking back to September 19th of last year, the only thing that I remember about it that was extraordinary other than the fact of this case was that I didn't get to watch Saturday Night Live. I think it's extraordinary that a child can remember that, and I think her story is extremely incred— is extremely credible.

1. *Ineffective Assistance of Counsel*

To determine whether Hart received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, counsel's performance must be deficient *and* the deficient performance must have prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). These are mixed questions of fact and law. *Id.* at 698. We will not reverse a trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. If the facts, however, have been established, whether counsel's representation was deficient and, if it was, whether it was prejudicial are questions of law which we review *de novo*. *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

Whether Hart's trial counsel's performance was deficient "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In other words, Hart must demonstrate that the representation fell below an objective standard of reasonableness as measured against prevailing professional norms. *Id.* at 688. In light of the wide range of reasonable professional assistance, we review the acts of counsel deferentially and presume counsel has acted properly. *Id.* at 689.

Hart's counsel elicited testimony from one witness, Reichert, that W. was being truthful when she claimed that she was assaulted by Hart. This was improper testimony because the credibility of a witness is left to the jury. *State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *Id.* Thus, in *Haseltine*, we reversed a conviction when an expert testified that there "was no doubt whatsoever" that the complainant was an incest victim. *Id.* Further, in *State v. Romero*, 147 Wis.2d 264, 277-78, 432 N.W.2d 899, 904-05 (1988), the supreme court reversed a conviction when a police officer testified that the victim "was being totally truthful with us." The supreme court determined that the credibility issue was "clouded" by the admission of improper statements. *Id.* at 279, 432 N.W.2d at 905.

Counsel asserted at the postconviction motion that his tactical reason for exploring Reichert's explanation as to why he believed W. was a credible witness was that the case turned on W.'s credibility and probing Reichert's opinion on this issue would help Hart's case. Counsel claimed that the best way of addressing this issue was to attack the improper testimony directly.² This is rarely sound trial strategy. In *State v. Felton*, 110 Wis.2d 485, 502-03, 329 N.W.2d 161, 169 (1983), the court refused to sanction trial counsel's strategy simply because it was denominated as such. The court stated:

[W]hen we look to a lawyer's conduct and measure it against this court's standard to determine effectiveness, we cannot ratify a lawyer's decision merely by labeling it, as did the trial court, "a matter of choice and of trial strategy." We must consider the law and the facts as they existed when trial counsel's conduct occurred. Trial counsel's decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied. We will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment.

Id.

The trial court found that counsel's performance was deficient because counsel should have never asked follow-up questions when Reichert commented that W. was an extremely credible witness. A reasonably prudent

² However, our review of the trial transcript reveals that why counsel decided not to object when confronted with Reichert's improper testimony is not so clear. At the end of the day, after the jury had been excused, the trial court confronted counsel with this issue. The court asked counsel if he had a tactical purpose for exploring Reichert's comment on W.'s credibility. Counsel's immediate response was that he did not have any tactical purpose but that Reichert had just made a nonresponsive statement. The court asked why he followed the improper testimony with additional questions relating to it. The court stated, "It was my conclusion that you had a tactical purpose." Counsel replied, "I didn't. I didn't. That was my error then." Once the court impressed upon counsel that the testimony was improper, counsel moved for a mistrial which the court denied.

lawyer would know, or should know, that pursuing this line of questioning will not succeed. Counsel cannot assure that a witness will retreat from his or her opinion. Indeed, counsel will usually elicit further improper opinion testimony. In this case, counsel should have moved to strike Reichert's answer as unresponsive and requested a curative instruction. Counsel's explanation as to why he elicited statements passing on the credibility of another witness was inadequate and his conduct falls below the objective standard of norms of acceptable assistance. Consequently, we conclude that counsel's performance was deficient.

Whether Hart's trial counsel's deficient performance was prejudicial "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Our review, then, focuses on whether the error causes us to believe that the outcome has been rendered unreliable. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 696. In determining this issue, we look at the totality of the circumstances and assume that the judge or jury acted in accordance with the law. *Id.* at 694-95.

Reichert's improper testimony does not undermine our confidence in the outcome of this case because the trial court instructed the jury on two separate occasions that it must disregard such evidence. The "possible prejudice to a defendant [caused by improper testimony] is presumptively erased from the jury's collective mind when admonitory instructions have been properly given by the court." *Roehl v. State*, 77 Wis.2d 398, 413, 253 N.W.2d 210, 217 (1977). Hart argues that the instruction did not cure the improper testimony because it was too general and untimely. He points to *State v. Penigar*, 139 Wis.2d 569, 580-82, 408 N.W.2d 28, 33-34 (1987), in which the supreme court determined that an instruction which did not expressly direct the jury to disregard the improper testimony was overly broad and inadequate to cure the defect.

We believe that *Penigar* is distinguishable because Reichert was the only witness who testified as to W.'s credibility. Therefore, a reasonable juror had to have understood that the instruction was directed towards Reichert's testimony. The instruction was not overly broad in terms of the subject matter or in terms of whose testimony was improper. In fact, it was almost identical to the one proffered by Hart except that it did not name any witness in particular towards whom the instruction might be directed. The jury was instructed to disregard *any* testimony by *any* witness regarding another witness's credibility. A reasonable juror would have included Reichert's improper testimony in this category.

Furthermore, that the trial court waited to admonish the jury until counsel, again, attempted to elicit the same improper testimony from another witness does not make the instruction untimely and superfluous. This was an appropriate context in which the court could cure the improper testimony. Additionally, at the end of testimony and before deliberations, the court again similarly instructed the jury. We conclude that no reasonable juror could have understood the curative instruction as permitting it to consider Reichert's improper testimony.

This case turned on W.'s claim that Hart sexually assaulted her. The jury must have believed W. or it would not have convicted Hicks. While the opinion testimony as to W.'s credibility was improper, the curative instruction permits us to maintain confidence in the outcome. The credibility issue was not "clouded" by the improper opinion testimony. The improper testimony did not deprive Hart of a fair trial the result of which is reliable.

2. *Mistrial*

Hart also argues that the trial court should have granted his request for a mistrial. The decision to grant a mistrial rests within the sound discretion of the trial court. *State v. Bunch*, 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct. App. 1995). When a defendant requests a mistrial for reasons not related to the State's overreaching or laxness, we afford a greater degree of deference to the trial court's decision. *Id.* at 507, 529 N.W.2d at 925. This is especially the case when the request is based upon conduct on the part of the defense. *Id.*

Hart's request for a mistrial was based upon his belief that the improper testimony, much of which was elicited by his counsel, could not be cured. However not all errors warrant a mistrial and "the law prefers less drastic alternatives, if available and practical." *Id.* at 512, 529 N.W.2d at 927. A mistrial is appropriate only when a "manifest necessity" exists for the termination of the trial. *Id.* at 507, 529 N.W.2d at 925.

In the instant case, a curative instruction directed the jury to disregard the improper testimony. As we stated above, this instruction was not overly broad and we presume that the jury adhered to it and did not consider Reichert's testimony when rendering its decision. This was the least drastic but most effective method of addressing the problem. Accordingly, we conclude that the trial court did not erroneously exercise its discretion when it denied Hart's motion for a mistrial.

3. *New Trial in the Interest of Justice*

Hart seeks a new trial in the interest of justice under § 752.35, STATS.³ Hart argues that the trial court's failure to instruct the jury to specifically disregard Reichert's testimony that W.'s story was extremely credible prevented the real controversy from being fully and fairly tried. Based upon our review of the record and the foregoing discussion, we conclude that the real controversy was fully tried and that a new trial is not warranted. The court instructed the jury to not consider *any* testimony by *any* witness passing

³ Section 752.35, STATS., provides:

In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

on the credibility of another witness. We have concluded that the instruction was adequate. Without a showing that the improper testimony was not corrected or that the jury improperly relied upon it to convict Hart, we see no reason to exercise our discretionary reversal power.

EXCLUSION OF EXPERT TESTIMONY

Hart proffered expert testimony that he suffered from sleep apnea. Hart contends that this evidence would show that this was a constant condition and that it is difficult to arouse from sleep a person who has sleep apnea especially when that person has been drinking alcohol. Hart argues that this evidence is extremely probative because it shows that W.'s story, that he awoke and assaulted her, is not plausible and supports his testimony that he fell asleep and was awakened by Sheri. Specifically, he argues that this evidence might have been sufficient to create reasonable doubt amongst the jury because the State's case was essentially based upon W.'s accusations. He contends that the exclusion of this testimony was an erroneous exercise of discretion on the part of the trial court and that it denied him his right to present a defense as guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution.

A defendant has a constitutional right guaranteed by the Sixth Amendment to the United States Constitution⁴ and Article I, § 7 of the Wisconsin Constitution⁵ to present evidence in support of his or her defense. *State v. Pulizzano*, 155 Wis.2d 633, 645, 456 N.W.2d 325, 330 (1990). This right, however, only pertains to relevant evidence the probative value of which is not substantially outweighed by its prejudicial effect. *Id.* at 646, 456 N.W.2d at 330.

⁴ The Sixth Amendment provides in pertinent part,

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor

⁵ Article I, § 7 of the Wisconsin Constitution provides in pertinent part,

In all criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face; [and] to have compulsory process to compel the attendance of witnesses in his behalf
....

Expert testimony is admissible to the extent it is relevant. Whether this evidence is relevant requires a showing that it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Section 904.01, STATS. "The criterion of relevancy is whether the evidence sought to be introduced would shed any light on the subject of inquiry." *State v. Patricia A.M.*, 176 Wis.2d 542, 550, 500 N.W.2d 289, 292 (1993) (quoted source omitted). Evidence is relevant when it supports a hypothesis of innocence. *Id.* at 550-51, 500 N.W.2d at 292.

A trial court's ruling on relevance will be reversed only for an erroneous exercise of discretion. *State v. Pittman*, 174 Wis.2d 255, 267, 496 N.W.2d 74, 79, *cert. denied*, 114 S. Ct. 137 (1993). A discretionary decision must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasonable and reasoned determination. *Id.* at 268, 496 N.W.2d at 79-80. When the trial court, however, has failed to recite reasons on the record for its decision, we will still affirm if the facts of record support the decision. *Id.*, 496 N.W.2d at 80.

Hart argues that the offer of proof was sufficient to support his contention that he was incapable of assaulting W. An offer of proof need not be inordinately detailed, but it should state an evidentiary hypothesis supported by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt. *State v. Robinson*, 146 Wis.2d 315, 327-28, 431 N.W.2d 165, 169 (1988). The offer of proof must enable us "to act with reasonable confidence that the evidentiary hypothesis can be sustained." *Id.* at 328, 431 N.W.2d at 169.

The offer of proof shows that the expert would have testified that Hart's sleep apnea condition was continuous and that it was difficult to arouse him when he was asleep. It did not show, however, whether his sleep apnea condition would have prevented him from waking up when W. rubbed his back. Based upon our review of the expert's records and the offer of proof, we conclude that the offer of proof was insufficient because it failed to show that the evidence of Hart's condition was relevant to his assertion that it was not plausible that he committed this crime. Consequently, the trial court did not erroneously exercise its discretion when it excluded the proffered evidence.

REVIEW OF COUNSELOR'S RECORDS

The trial court reviewed the records of W.'s counselor and concluded they were not relevant to Hart's defense. The preliminary showing of relevance is a question of law we review independently, notwithstanding that relevancy is ordinarily within the trial court's discretion. *State v. Speese*, 191 Wis.2d 205, 222, 528 N.W.2d 63, 70 (Ct. App. 1995), *rev'd on other grounds*, No. 93-0443 (Wis. Mar. 20, 1996). We have conducted our own *in camera* review of the records. The trial court was correct in concluding they contain no information relevant to Hart's defense.

JURY POLLING

Hart argues his defense counsel was ineffective by waiving Hart's right to individually poll the jury without informing him of that right and without advising him that it was his personal decision to make. Even if the right is one that can be waived by counsel without consultation, Hart argues his counsel was ineffective in this case. The trial court rejected the argument.

To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. *Id.* at 697. We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

We conclude counsel can waive the right to poll the jury without advising the defendant. In *State v. Jackson*, 188 Wis.2d 537, 525 N.W.2d 165 (Ct. App. 1994), we decided that where counsel is present at the return of the jury verdict, the trial court need not find that the defendant knowingly and voluntarily waived his or her right to individually poll the jury. *Id.* at 542, 525 N.W.2d at 167. We also concluded: "Jackson was represented by counsel when the verdict was entered, and the decision to assert or waive certain rights, including whether to poll the jury, was delegated to that counsel." *Id.* at 542-43,

525 N.W.2d at 168. We read *Jackson* as holding that the decision whether to request an individual polling is one delegated to counsel.

Because the decision whether to request an individual polling is one delegated to counsel, we decline to hold that counsel's failure to inform a defendant of the right to an individual polling is, in itself, deficient performance. The better rule is that when counsel is present at the return of the jury verdict and does not request an individual polling, whether counsel's performance is deficient depends on all the circumstances.

Hart argues his counsel's performance was deficient in this case because counsel had no strategic or tactical reason to waive the polling. It is unlikely there would ever be a "strategic" reason to waive polling. Therefore, Hart's argument is essentially that it is always deficient performance for counsel to waive polling because, as he phrases it, there is "nothing to lose and everything to gain." We reject the argument because Hart is incorrect that there is nothing to lose. The thing to be lost is time. There are many acts counsel may take in litigation which only cost time and might have some slim chance of success. However, it is not deficient performance for counsel to fail to pursue every conceivable, but most likely futile, gesture. Hart points to no specific facts that should have indicated to his counsel that there was anything to gain by an individual poll of the jury in this case. Therefore, we conclude his counsel's performance was not deficient.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.